84-1024

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No.

IN THE SUPREME COURT OF
THE UNITED STATES

Term, 1984

IN RE: GEORGE E. EWING, DEBTOR

DONALD R. CALAIARO, TRUSTEE,

Appellant-Petitioner

v.

PITTSBURGH NATIONAL BANK and
COVENTRY CARE, INC.,

Appellees

1. PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

2. APPENDIX

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QUESTION PRESENTED FOR REVIEW

WHETHER THE INVOLUNTARY SALE OF A DEBTOR'S PLEDGED STOCK BY A CREDITOR, WITHIN ONE YEAR OF THE ORDER FOR RELIEF, IS A TRANSFER WITHIN THE MEANING OF THE BANKRUPTCY CODE §§101(41) and 548(d)(1), 11 U.S.C. §101(41) and 11 U.S.C. §548(d)(1).

Petitioner, Donald R. Calaiaro, Trustee, requests the allowance of a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered September 18, 1984.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURT BELOW

Memorandum Opinion and Order of the Honorable Gerald K. Gibson, Bankruptcy Judge, entered September 19, 1983 is reported at 33 B.R. 288 (Bkrtcy W.D.Pa. 1983) and is appended at A-21.

Memorandum Opinion and Order of the Honorable Carol Los Mansmann, District Judge, entered, January 18, 1984 is reported at 36 B.R. 476 (W.D.Pa 1984) and is appended at A-32.

Judgment Order of the Honorable Seitz, Beck and Rosenn, Circuit Judges, entered September 18, 1984 is unreported and is appended at A-43.

Denial of Petition for Rehearing by Available Circuit Judges entered October 15, 1984 is unreported and is appended at A-45.

STATEMENT OF THE GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOLVED

The Judgment Order of Seitz, Becker and Rosenn, Circuit Judges for the United States Court of Appeals for the Third Circuit was entered on September 18, 1984. The Appellant's Petition for Rehearing was denied on October 15, 1984. This Petition seeking determination and relief as provided in 28 U.S.C. §2106 is filed within ninety (90) days of the entry of the judgment in accordance with 28 U.S.C. §§1254(1) and 2102(c).

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit by virtue of 28 U.S.C. §1254(1).

STATUTES WHICH THE CASE INVOLVES

1. UNITED STATES BANKRUPTCY CODE PROVISIONS

A. 11 U.S.C. §101 DEFINITIONS

11 U.S.C. §101(41) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest. Pub.L.95-598, Nov. 6, 1978, 92 Stat. 2549; Pub.L. 97-222, §1, July 27, 1982, 96 Stat. 235.

B. 11 U.S.C. §548 FRAUDULENT TRANSFERS AND OBLIGATIONS

11 U.S.C. §548(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor -

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer occurred or such obligation was incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on any interest transferred, may retain any lien transferred, or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer becomes so far perfected that a bona fide purchaser from the debtor against

whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition.

(2) In this section -

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor; and

(B) a commodity broker, forward contract merchant, stockbroker, or securities clearing agency that receives a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, takes for value to the extent of such payment. Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2600; Pub.L. 97-222, §5, July 27, 1982, 96 Stat. 236.

C. 11 U.S.C. §550 LIABILITY OF TRANSFEREE OF AVOIDED TRANSFER

11 U.S.C. §550(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548,

549, or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from -

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under subsection (a)(2) of this section from -

(1) a transferor that takes for value, including satisfaction or securing of a present or antecedent debt in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(d)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of -

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by such transferee from such property; and

(B) any increase in value as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes -

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property;

(E) discharge of any lien against such property that is superior or equal to the rights of the trustee; and

(F) preservation of such property;

(e) An action or proceeding under this section may not be commenced after the earlier of -

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; and

(2) the time the case is closed or dismissed. Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2601.

2. COMMONWEALTH OF PENNSYLVANIA UNIFORM COMMERCIAL CODE PROVISIONS

A. 13 Pa.C.S. §9311 ALIENABILITY OF RIGHT OF DEBTOR; JUDICIAL PROCESS

13 Pa.C.S. §9311 The rights of a debtor in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default. 1979, Nov. 1, P.L. 255, No. 86, §1, effective Jan. 1, 1980.

B. 13 Pa.C.S. §9504 RIGHT OF SECURED PARTY TO DISPOSE OF COLLATERAL AFTER DEFAULT; EFFECT OF DISPOSITION

13 Pa.C.S. §9504(a) Disposition of collateral and application of proceeds. - A secured party after default may sell, lease or otherwise dispose of any of all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to Division 2 (relating to sale). The proceeds of disposition shall be applied in the order following to:

(1) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party.

(2) the satisfaction of indebtedness secured by the security interest under which the disposition is made; and

(3) the satisfaction of indebtedness secured by any subordin ate security interest in the collateral if written notificiation of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(b) Rights of parties in case of surplus or deficiency. - If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(c) Manner of disposition. - Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods, no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before renunciation by the debtor of his rights) written notice of a claim of any interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(d) Rights of purchaser for value of disposed collateral. - When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the rights of the debtor therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this chapter or of any judicial proceedings:

(1) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(2) in any other case, if the purchaser acts in good faith.

(e) Right of subrogation of person liable to secured party. - A person who is liable to a secured party under a guaranty, endorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this division. 1979, Nov. 1, P.L. 255, No. 86, §1, effective Jan. 1, 1980. As amended 1982, Nov. 26, P.O. 696, No. 201, §1, effective in 180 days.

STATEMENT OF THE CASE

In September of 1977, the Debtor, George Ewing (Ewing), pledged 75,000 shares of Class B Common Stock and 9,500 shares of Class A Common Stock in Coventry Care, Inc. (Coventry Care) to Pittsburgh National Bank (PNB) as security for a loan of $67,000.00.

Ewing subsequently defaulted on the loan and in March of 1980 PNB commenced an involuntary sale of his pledged shares of Coventry Care stock to satisfy his obligation on the loan. The sale of this stock was finalized on April 10, 1980 when Coventry Care bought all of the shares of stock for $72,500.00 (an amount equal to the balance of the unpaid principal of $61,602.10 plus interest). In August of 1980, only four months later, Ewing commenced a voluntary Chapter 11 Case.

The complaint, which is the subject of this Petition, was subsequently filed by the Trustee, Donald R. Calaiaro, claiming

that the involuntary sale consummated on April 10, 1980 by PNB was a transfer within the meaning of §548 of the Bankruptcy Code and that the Trustee is entitled to avoid the transfer.

The Bankruptcy Court held that the involuntary sale was a transfer within the meaning of Bankruptcy Code §548(a)(2), 11 U.S.C. §548(a)(2), and therefore voidable. The United States District Court for the Western District of Pennsylvania reversed reasoning that the pledge of the stock was the only transfer and was outside the one year limitation of §548. In other words, the District Court held that the involuntary liquidation sale was not a transfer. The United States Court of Appeals for the Third Circuit affirmed the District Court without opinion. The Trustee's Petition for Rehearing was subsequently denied.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction over the subject matter of this case exists and continues to exist in the United States Bankruptcy Court for the Western District of Pennsylvania pursuant to 28 U.S.C. §1471 and §1334 where Donald R. Calaiaro, as the Trustee in the Bankruptcy Case of George E. Ewing, commenced this Action by filing a complaint.

ARGUMENT

I. The Writ of Certiorari Should Be Allowed To Review The Third Circuit Opinion In Order To Resolve The Conflicts Among the Circuit Courts Of Appeal.

The issue in this case is whether or not the involuntary sale of pledged collateral is a transfer within the the meaning of Bankruptcy Code §548. This involves the determination of the meaning of the term "transfer" under §548 of the Bankruptcy Code. The holding of the Third Circuit in this case (that such a sale is not a transfer) is in conflict with the Fifth Circuit

holdings of Durrett v. Washington National Insurance, 621 F.2d 201 (CA5 1980) and Abramson v. Lakewood Bank and Trust Company, 647 F.2d 547 (CA5 1981) and the Eighth Circuit holding in In Re: Hulm, ____ F.2d ____, 11 C.B.C. 152 (CA8 1984). In those cases the Fifth Circuit and the Eighth Circuit, respectively, held that an involuntary foreclosure sale is a transfer under Bankruptcy Code §548.

II. The Writ Of Certiorari Should Be Allowed Because The Opinion Below Is In Contradiction To The Obvious Intent Of Congress.

The Third Circuit Court of Appeals interpreted Bankruptcy Code §548 when the underlying Adversary Proceeding was commenced. Section 548 was in the form set forth previously. Since that time the Bankruptcy Amendments and Federal Judgeship Act of 1984 has amended §548 to state:

> (a) The Trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, [if the debtor] voluntarily or involuntarily/ (additions are indicated by underlining and deletions by brackets)

This amendment was simply meant to make explicit where it was already implicit in the meaning of this section; that any transfer of an interest of a debtor is potentially subject to §548.

The Bankruptcy Code writers recognized that in some situtions the debtor would be a passive participant as creditors consummated involuntary transfers of collateral for less than reasonably equivalent value. Bankruptcy Code §548 is intended to protect the debtor and the Bankruptcy Estate from any type of inadequate transfer of the debtor's property interest, whether legal or equitable. The Third Circuit's holding frustrates such Congressional purpose.

III. The Writ Of Certiorari Should Be Allowed Because The Decision Of The Third Circuit Concerning The Meaning Of Transfer Within §548 Of The Bankruptcy Code Is In Conflict With The Pennsylvania Law Concerning The Property Rights Of Debtors.

The Circuit Court incorrectly interpreted Pennsylvania Law as it applies to the Bankruptcy Code. Pennsylvania Law determines the rights of debtors and creditors under the Bankruptcy Code as used in Pennsylvania. Under Pennsylvania Law when the debtor transfers collateral to a creditor to secure an obligation, the debtor transfers only a security interest; he retains an equitable interest. Comment 1 on 13 Pa.C.S.A. §9311 provides:

> "Purposes: 1. To make clear that in all security transactions under this Article, the debtor has an interest (whether legal title or an equity) which he can dispose of and which his creditors can reach." Uniform Commercial Code Comment to 13 Pa.C.S.A. §9311.

Pittsburgh National Bank contended that when George Ewing pledged his stock to Pittsburgh

National Bank as security for a loan that, at that time, he transferred all of his interest in the stock. However, under Pennsylvania Law, upon a contract of pledge, title in the pledged property remains in the pledgor subject to a lien in favor of the pledgee in the amount of the debt. Further, the pledgee is liable for return of the pledged property upon satisfaction of the obligation. In Re: Gordon, 334 Pa. 262, 25 A.2d 304 (1942). It is clear under Pennsylvania law that at the time Pittsburgh National Bank consummated its involuntary sale, the debtor had an equitable interest in the stock beyond the value needed to secure repayment of the loan. The Circuit Court of Appeals for the Third Circuit misapprehended the meaning and purpose of providing a creditor with a security interest. The Pennsylvania Uniform Commercial Code recognizes

a right in the debtor to collateral which he has pledged to a creditor. 13 Pa.C.S. §9311.

Further, the pledge of collateral is not a grant of absolute ownership. The Pennsylvania Uniform Commercial Code imposes an affirmative obligation on the secured creditor to dispose of collateral in a commercially reasonable manner to protect the interests in that collateral which the debtor still possesses. 13 Pa.C.S. §9504. If as the Court of Appeals for the Third Circuit indicated the pledging of property as security is equivalent to the absolute transfer contemplated under §548 of the Bankruptcy Code, then there would be no need for the creditor to account to the debtor for surplus received from the forced sale of collateral. Obviously, the decision below contradicts Pennsylvania law and will cause great confusion in commercial transactions. This

improper interpretation of the Uniform Commercial Code has national effect and potentially devastating economic impact.

WHEREFORE, Petitioner respectfully prays that the Writ of Certiorari be allowed.

Respectfully submitted,

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In the Matter of George R. EWING, Debtor.

Donald R. CALAIARO, Esq., Trustee, Plaintiff,

v.

PITTSBURGH NATIONAL BANK and Coventry Care, Inc., Defendants.

Bankruptcy No. 80-1227.
Adv. No. 82-104.

United States Bankruptcy Court, W.D. Pennsylvania.

Sept. 19, 1983.
(33 B.R. 288)

MEMORANDUM OPINION

Gerald K. Gibson, Bankruptcy Judge.

The matter presently before the Court is a complaint to avoid a fraudulent transfer, wherein Trustee alleges that secured creditor's involuntary pre-petition sale of stock pledged by Debtor for less than its reasonably equivalent value constitutes a fraudulent transfer under §548 of the Bankruptcy Code and the Pennsylvania Fraudulent Conveyance Act. Trustee also alleges that the foreclosure sale was not conducted in conformity with

reasonable commercial practices as required by the Uniform Commercial Code.

The Court has agreed to confine its present determination to the issue of fraudulent conveyance under the Bankruptcy Code. The remaining issues of fraudulent conveyance under state law and commercial unreasonableness raised in plaintiff's complaint and defendants' motions to strike will be considered at a later date, if necessary.

The facts are briefly as follows. Commencing on or about November 12, 1968, and at various times thereafter, Debtor borrowed sums of money form Pittsburgh National Bank, hereinafter "PNB"; and executed promissory notes and pledge agreements to secure said debt. In September, 1977, Debtor borrowed the sum of $67,000.00 from PNB at which time he pledged 75,000 shares of Class B common stock and 9,500 shares of Class A common stock in Coventry Care, Inc. hereinafter

"CCI" to secure the repayment of his indebtedness.

Upon Debtor's default, PNB commenced an involuntary sale of Debtor's shares of CCI. The sale was consummated on April 10, 1980, at which time, CCI purchased the shares for the amount of $72,000.00. Some months later, in August, 1980, Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code. The case was subsequently converted to a Chapter 7.

The parties have stipulated that prior to the closed bid sale, PNB advertised the sale in the Wall Street Journal and Pittsburgh Post Gazette. Notice of sale and conditions thereto were sent to those parties who appear on Exhibit D of the Stipulation.

In his brief, Trustee presents the following arguments. A sale of the Debtor's equity interest in secured collateral can be interpreted as a fraudulent conveyance pursuant to §548 of the Bankruptcy Code, which allows the Trustee to avoid any transfer of an interest in debtor's property within one year prior to the filing of the bankruptcy petition while

debtor is insolvent for which he receives less than reasonably equivalent consideration. Trustee further argues that the transfer, for purposes of §548, occurred at the time of sale in April, 1980. Prior thereto, PNB's interest in the stock was limited to that necessary to secure repayment of the loan; and Debtor retained property rights in the remaining value. Finally, Trustee asserts that §548 is applicable to involuntary foreclosures as well as voluntary transfers by the Debtor.

In its brief in support of its motion to dismiss Trustee's complaint, PNB argues as follows. The transfer which Debtor claims to have been fraudulent within the meaning of §548 occurred outside the one-year period prior to the filing of the bankruptcy petition and is therefore not vulnerable to attack under §548. PNB asserts that by virtue of the Uniform Commercial Code, a security interest in instruments is perfected by possession. Since PNB had possession of the securities

at all times subsequent to the pledge, its security interest was perfected as against a bona fide purchaser. Therefore, the transfer occurred at the time of the pledge, in September, 1977; or at the latest, upon execution of a new pledge agreement in 1978.

In its brief in support of its motion to dismiss, CCI argues that a sale brought by a secured creditor to enforce its perfected lien in Debtor's property is not a fraudulent conveyance within the meaning of §548. CCI first asserts that §548 only pertains to actions taken by the Debtor, and does not include actions taken by a secured creditor in foreclosure upon the collateral. CCI further asserts that since the transfer occurred upon delivery of possession of the pledged stock to PNB in September, 1977, §548 is inapplicable.

Having summarized the arguments of counsel, the Court now turns to the relevant provisions of the Bankruptcy Code. Section 548(a)(2)(A) provides as follows:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor-

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

Section 101(40) defines "transfer" as follows:

(40) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest.

Section 548(d)(1) further states as follows:

(d)(1) For the purposes of this section, a transfer is made when such transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such transfer is not so perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition.

The Court now examines related case law in order to ascertain whether an involuntary transfer by a secured creditor constitutes a transfer with the meaning of §548, as well as when the transfer is deemed to have occurred.

Counsel for CCI relies upon the case of Lovett v. Shuster, 633 F.2d 98 (8th Cir. 1980) decided under the Bankruptcy Act. Therein, the Court considered whether the transfer of collateral for purposes of 67(d) (the fraudulent conveyance provision) took place upon debtor's

delivery of stock to the secured party; or upon assignment of title to the secured party. The Court held that for purposes of 67(d)(2), collateral was transferred upon delivery of possession. However, in Lovett, supra, the factual situation was significantly different from that at bar for the foreclosure sale took place some months after the filing of the petition in bankruptcy .

Counsel for the defendants cite the case of In Re Alsop, 14 B.R. 982, 8 B.C.D. 335, 5 C.B.C. 2d 797 (Bkrtcy. D. Alaska 1981) in support of their position that a foreclosure sale within one year of bankruptcy does not constitute a transfer within the meaning of §548. However, other courts have reached different results. In Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980), Debtor-In-Possession under the Bankruptcy Act sought to vacate the transfer of real property nine days prior to filing. The Fifth Circuit affirmed the District Court's holding that a non-judicial sale constituted a transfer within

the meaning of §67(d). The Court further held that the sale price of $115,400.00 for a parcel valued by the Court at $200,000.00 was not a fair equivalent and was therefore avoidable under §67(d).

In Abramson v. Lakewood Bank and Trust Company, 647 F.2d 547 (5th Cir. 1981) cert. denied, 454 U.S. 1164, 102 S.Ct. 1038, 71 L.Ed.2d 320 (1982), the Fifth Circuit reversed a lower court decision that a non-judicial foreclosure sale of debtor's land was not a transfer within the meaning of §67(d). The Court states: ". . . as this transfer occurred within the one-year period, it is subject to being set aside as fraudulent if it was made without fair consideration." (p.549).

Other courts have reached similar results under the Bankruptcy Code. In In re Jones 20 B.R. 988 (Bkrtcy. E.D.Pa., 1982), Judge Goldhaber held that where a sheriff's sale within one year of filing while debtor was insolvent failed to bring a reasonably equivalent value, it was avoidable under §548(a)(2).

Similar conclusions have been reached in In re Smith, 21 B.R. 345 (Bkrtcy. M.D.Fla. 1982); and Matter of Marshall, 15 B.R. 738 (Bkrtcy. W.D.N.C. 1981).

[1] While the foregoing cases deal with foreclosure upon real estate, the issue at bar concerns the involuntary sale of securities pledged as collateral. Under Pennsylvania law, upon a contract of pledge, title in the pledged property remains in the pledgor subject to a lien in favor of the pledgee for the amount of the debt. Further, the pledgee is liable for return of the pledged property upon satisfaction of the obligation. In re Gordon, 344 Pa. 262, 25 A.2d 304 (1942). Moreover, under the provisions of the Pennsylvania Uniform Commercial Code applicable to the pledge at bar, the secured creditor must account to the debtor for any surplus resulting from the secured creditors disposition of the collateral upon debtor's default. 13 Pa.C.S.A. §9504(b).

[2] In the case at bar, PNB was the

holder of a properly perfected security interest in the securities pledged as collateral for repayment of Debtor's obligation. However, Debtor retained an interest in the collateral to the extent that its value exceeded PNB's secured debt. It was only upon sale of the collateral to CCI that Debtor's interest therein was extinguished. Therefore, the Court is convinced that the transfer, for purposes of §548, occurred on April 10, 1980; the date of sale.

[3] Based upon the foregoing, the Court is satisfied that for purposes of §548, the involuntary sale of stock in the case at bar constituted a transfer within one year of the filing of the petition while Debtor was insolvent, or rendered insolvent thereby. If after further testimony it is determined that the sale was not for reasonably equivalent value, the transfer will be avoided pursuant to §548.

In Re George R. EWING, Debtor.

Donald R. CALAIARO, Trustee, Plaintiff,

v.

PITTSBURGH NATIONAL BANK and
Coventry, Care, Inc., Defendants.

Civ. A. No. 83-2640.
Bankruptcy No. 80-1227.
Adv. No. 82-104.

United States District Court,
W.D. Pennsylvania.

Jan. 18, 1984
(36 B.R. 476)

MEMORANDUM OPINION

Mansmann, District Judge.

The instant matter is before this Court on appeal from an Order of the Bankruptcy Court for the Western District of Pennsylvania, dated September 19, 1983, which denied motions to dismiss the Plaintiff's Complaint made by Coventry Care, Inc. (CCI) and Pittsburgh National Bank (PNB).[1]

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1 Also before this Court are two motions: the Trustee's motion to quash the appeal and CCI's motion for withdrawal of reference. With respect to the first motion, the Trustee has asserted that the Order of the Bankruptcy

After careful consideration of the record before this Court, the briefs filed[2] and oral arguments of counsel, this Court reverses the Order of the Bankruptcy Court and dismisses the Plaintiff's complaint.

* * *

Factual Background

The facts of this matter were stipulated by the parties before the Bankruptcy Court. Those pertinent to the issues raised by the instant appeal are as follows:

Commencing on or about November 12, 1968, George R. Ewing (the Debtor), borrowed various

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1(cont) Judge is interlocutory and that since leave to appeal was not requested by CCI, its appeal should be dismissed. However, since the notice of appeal was timely filed, we choose, in the discretion of this Court as permitted under FED.R.BANKR.P. 8003(a)(3), to deny the trustee's motion and to determine the appeal on its merits. With respect to CCI's motion for withdrawal of reference, in light of this opinion, it is denied as moot.

2 Although PNB did not appeal from the September 19, 1983 Order, it has filed an amicus curae brief with the permission of this Court.

sums of money from PNB. To secure the debt, the Debtor executed promissory notes and pledge agreements.

On September 30, 1977 the Debtor borrowed $67,000.00 from PNB and executed a 90-day note and pledge agreement. At this time, the Debtor pledged 75,000 shares of class B common stock and 9,500 shares of class A common stock in CCI. Thereafter, the loan was extended for various additional 90-day periods. Further, on or about June 27, 1978, the Debtor executed a promissory note and pledge agreement[3] to secure an additional 90-day extension of the debt.

Following a default in repayment of the debt, PNB noticed and held a closed bid sale to liquidate th stock pursuant to its rights

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3 It is unclear from the record if new shares of CCI were pledged this date, or if the previously pledged shares were repledged. However, since both dates are outside of the one year period prior to the filing of the petition in bankruptcy, this distinction is irrevelant.

under the June 27, 1978 note.

The sale of the stock was consummated on April 10, 1980 when it was sold to CCI for $72,500.00.

Thereafter, in August of 1980, the Debtor filed his petition in bankruptcy.[4]

* * *

The issue before this Court is whether the debtor's property was transferred within the meaning of 11 U.S.C. §548 within one year prior to his filing of the bankruptcy petition. More specifically, this Court is faced with determining whether a "transfer" of the debtor's property, as defined in 11 U.S.C. §548 took place either in September of 1977 or on June 27, 1978 (the dates the Debtor pledged his securities) or on April 10, 1980 (the date PNB sold the stock).

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4 Initially, the Debtor commenced a voluntary Chapter 11 case, but this was later converted to a Chapter 7 case.

[1] For the reasons set forth below, this Court finds that the "transfer" within the meaning of 11 U.S.C. §548 took place when the Debtor pledged his shares of CCI to PNB, either in September of 1977 or on June 27, 1978. Since this transpired outside of the one year pre-petition period set forth in 11 U.S.C. §548(a), this "transfer" is not avoidable pursuant to the Bankruptcy Code, notwithstanding that the actual sale of the stock by PNB took place on April 10, 1980, less than one year before the Debtor filed his petition in bankruptcy.

* * *

11 U.S.C. §548 provides that under certain conditions:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition . . .

11 U.S.C. §548 further provides the definition of "transfer":[5]

(d)(1) For the purposes of this section, a transfer is made when such transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee . . .

[2] In order to determine under the Bankruptcy Act when a transfer becomes perfected to the extent that the transferee has rights superior to that of a bona fide pruchaser from the transferor, it is necessary to refer to

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5 It is acknowledged that 11 U.S.C. §101(40) generally defines "transfer" as " . . . every mode, direct or indirect, absolute or conditional, voluntary or involuntary, or disposing of or parting with property or with an interest in property, including retention of title as a security interest". However, the specific definition of "transfer" set forth in 11 U.S.C. §548(d)(1) is applicable to §548 and controls here.

the applicable state law, Appeal of Copeland, 531 F.2d 1195 (3d Cir. 1976), which governs the secured interests asserted by the parties in a bankruptcy proceeding. In the Matter of Bollinger Corp., 614 F.2d 924 (3d Cir. 1980).

In this connection, Pennsylvania's Uniform Commercial Code sets forth when a security interest is perfected with regard to securities.

13 PA. CONS. STAT. ANN. §9303(a) (Purdon Supp. 1983) provides, in pertinent part:

A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken . . .

More specifically, 13 PA. CONS. STAT. §9304(a) (Purdon Supp. 1983) sets forth when a security interest in perfected in instruments:[6]

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6 "Instrument" is defined in 13 PA. CONS. STAT. ANN. §9105(a) (Purdon Supp. 1983) as "(a) negotiable instrument (defined in §3104), or a security (defined in §8102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment".

A security interest in . . . instruments . . . can be perfected only by the secured party's taking possession . . .

Therfore, it is quite clear, when applying state law, more particularly, Article 9 of Pennsylvania's Uniform Commercial Code to the instant situation, that the perfection of PNB's security interest in the Debtor's stock certificates took place in either September of 1977 or on June 27, 1978 when the stock was pledged and PNB was given possession of same.

In Appeal of Copeland, 531 F.2d 1195 (3d Cir. 1976) the U.S. Court of Appeals for the Third Circuit , after applying state law (Article 9 of Delaware's Uniform Comercial Code), held that the creditor's security interest in the debtor's securities was perfected when the stock certificates were pledged (when the escrow agent gained possession of the stock certificates in that case). More recently, when faced with an analogous situation, in Dean Witter Reynolds, Inc. v. MacQuown, 717

F.2d 859 (3d Cir. 1983) the Court of Appeals held that under Pennsylvania law, for the purposes of the bankruptcy act,[7] a transfer of realty[8] is completed i.e., "is good as against a subsequent bona fide purchaser . . . when the deed is recorded . . . " Id. at 863. Similarly, we find for the purposes of the bankruptcy act, a security interest in securities perfected when the stock certificates are pledged.

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7 §14(c)(4) of the old bankruptcy act was at issue and was analogized to §67(d)(5) which parallels the current 11 U.S.C. §548(d)(1).

8 This Court would also note that the Bankruptcy Court relied on two Fifth Circuit cases which dealt with the transfer of real property interests (deeds of trust) under the old bankruptcy act, Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir. 1981) and Durrett v. Washington National Ins. Co., 621 F.2d 201 (5th Cir. 1980). While this Court would agree that the factual situations may be somewhat analogous, we do not find their holdings (i.e., that the "transfer" for purposes of the bankruptcy act is the date of the foreclosure sale), to be controlling here in light of the Third Circuit opinions cited above.

In Lovett v. Shuster, 633 F.2d 98 (8th Cir. 1980), when faced with a strikingly similar factual situation (under §67(d)(5) of the former Bankruptcy Act (11 U.S.C. §107(d)(5), the Court of Appeals for the Eighth Circuit held that the "transfer" for the purpose of that section of the Bankruptcy Code took place when the secured party took possession of the pledged securities because state law provided that this constituted the perfection of the security interest, and not when the foreclosure sale took place (which was held after the filing of the petition in bankruptcy).

* * *

Therefore, consistent with the above, the "transfer" of the Debtor's properties for the purposes of 11 U.S.C. §548 transpired when he pledged the stock to PNB, which act perfected its security interest. Since this took place prior to the filing of the bankruptcy petition by more than one year, this Court finds that this "transfer" cannot be avoided. Accordingly,

the Order of the Bankruptcy Court is reversed.

An appropriate Order will issue.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-3098

GEORGE E. EWING, Debtor
DONALD R. CALAIARO, Trustee

v.

PITTSBURGH NATIONAL BANK
and COVENTRY CARE, INC.

Donald R. Calaiaro,
Appellant

Appeal From the United States
District Court for the Western
District of Pennsylvania
(D.C. Civil No. 83-2640)
District Judge: Honorable
Carol Los Mansmann

Submitted Under Third Circuit
Rule 12(6)
September 11, 1984
Before: SEITZ, BECKER, and ROSENN,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant(s), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant(s).

By the Court,

/s/
Circuit Judge

Attest:

/s/
Betty J. Robinson, Deputy Clerk

Dated: September 18, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-3098

GEORGE E. EWING, Debtor
DONALD R. CALAIARO, Trustee

v.

PITTSBURGH NATIONAL BANK
and COVENTRY CARE, INC.

Donald R. Calaiaro,
Appellant

Appeal From the United States
District Court for the Western
District of Pennsylvania
(D.C. Civil No. 83-2640)

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER and ROSENN, Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit

in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Seitz
Circuit Judge

Dated: October 15, 1984

IN THE SUPREME COURT OF
THE UNITED STATES

IN RE: GEORGE E. EWING,	)
	)
Debtor	)
	)
DONALD R. CALAIARO, TRUSTEE,	)
	)
Appellant-Petitioner	)
	)
v.	)
	)
PITTSBURGH NATIONAL BANK and COVENTRY CARE, INC.,	)
	)
Appellees	)

CERTIFICATE OF SERVICE

I, Robert O Lampl, certify that on December 13, 1984, I caused three true and correct copies of the foregoing Petition for Writ of Certiorari to be served upon all other parties in this case, in accordance with the Rules of the Supreme Court of the United States, Rule 28.5(b) as follows:

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